Supreme Court, U.S.
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NO. 01-284

IN THE

Supreme Court of the United States

Arthur Hollander

Petitioner.

--- v ---

American Cyanamid Company

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Pro Se Petitioner,

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REPLY ARGUMENT

At the core of Hollander's petition are important legal issues that affect not just Hollander, but all other discrimination plaintiffs in the Second Circuit. Cyanamid. in its Respondent's Brief in Opposition, has skillfully added layers of distortion, misleading argument, and subtle negative characterizations. Hollander herein sets about to unwrap the most prominent of these with the hope that the real questions will once again be visible.

1. Pretext And The Fisher Standard

The District Court stated: "This court has held before, and the Second Circuit has agreed, that for purposes of ruling on the motion for summary judgment, Hollander had established his prima facie case." *Hollander*, 895 F.2d at 83, cited 999 F.Supp. 252, 257 (D.Conn 1998).

Cyanamid claims that Hollander has "at best ... a prima facie case, combined with the employee's attack on the employer's explanation..." [Oppos. Brf. p.10]. This is utterly false. The District Court, after reviewing the *abundant* evidence, produced by Hollander [Petition. App. 7a] stated as to the issue of pretext:

> "This court agrees with plaintiff that his evidence *may in fact* raise some doubt as to whether defendant's articulated reason for discharging him is believable." (999 F.Supp. at 258). (emphasis added)

At summary judgment the "benefit-of-the-doubt" principle must be ruled in favor of the nonmovant, and so this language need not be any stronger to confirm that the District Court found ample evidence at summary judgment that Hollander had established pretext.

The Appeals court chose not to decide the matter either way: "We need not decide whether Hollander offered evidence to establish that Cyanamid used his allegedly poor

interpersonal skills as a pretext ... Assuming arguendo that he did .... (Petition Brf. p. 4) (infra. p. 2) (emphasis added). And their reason was that it did not matter, because even if Hollander had shown pretext, that was not enough. This, of course, is the underlying issue. What they wanted was, either a *special kind* of pretext, i.e., one that pointed to discrimination, or additional evidence. And they wanted this not because they judged Hollander's case generally lacking, but because *Fisher* demanded it:

> "Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also *either use of pretext that itself implies a discriminatory stereotype, or use of pretext to hide age discrimination.* This he did not do." 172 F.3d at 200 (Pet. App. 12a) (Italics in original).

The fact that the District court did find that Hollander had shown pretext, and that the Appeals Court did not decide the issue, makes it deceptively misleading and wrong to represent to this court that "the Second Circuit found that Petitioner did no more than ... establishing a prima facie case...". (Oppos. Brf. p.8) (emphasis added). In fact, the Second Circuit made no such "finding" -- it did not entertain the question. Had it been true, as Cyanamid claims, that Petitioner had established only a prima facie case, "which was not enough to survive summary judgment under any interpretation of the McDonnell Douglas standard" (Oppos. Brf. p.8-9), the courts would have simply dismissed it on that account and not gone on at length, based upon Fisher, explaining why pretext wasn't enough.

2. Fisher Was Decisive In Hollander

Apparently the second part of Cyanamid's false portrayal of what the District and Appeals Courts ruled in Hollander, is the false idea that "*Fisher* did not play a

decisive role" (Oppos. Brf. p. 7, n.4) On the contrary, it was the heart of the decision to grant summary judgment. Note also that Cyanamid failed to state what alternative it considers to have been decisive.

Once the District Court had granted that Hollander had shown pretext, it is a small step (based upon *St. Mary's Honor Center v. Hicks,* 509 U.S. at 511) to conclude that a jury could infer intentional discrimination. However the District Court refused to make this step, and it based its refusal *solely* upon *Fisher*, as the Court went on for two full pages, referencing *Fisher* -- and only *Fisher* -- eight times, as it explained why Hollander's pretext evidence would not be enough. It began its discussion referring to *Fisher* as "an important Second Circuit en banc decision," and justified its failure to allow a jury to decide intentional discrimination, based upon *Fisher:*

> "Accordingly, plaintiff may prevail only if he shows that Cyanamid's proffered reasons are a pretext for discrimination 'either because the pretext finding itself points to discrimination or because other evidence in the record points to that direction - or both." citing *Fisher* at 1339 (999 F.Supp. at 258-259).

After accepting Hollander's showing of pretext, the District Court used *Fisher* as its only reason for stopping short of reaching the *St. Mary's Honor Center's* sufficiency to show intentional discrimination.

When the Appeals Court reviewed the District Court's decision it, too, relied upon *Fisher*. As explained before, while it did not itself decide whether or not Hollander established pretext, it did declare that any such pretext would have to meet the *Fisher* standard:

> "Assuming that he did, this is far from the end of the matter, for to survive summary judgment Hollander had

> to show not only pretext, but also *either use of pretext that itself implies a discriminatory stenotype, or use of pretext to hide age discrimination.* This he did not do." 172 F.3d at 200 (Pet. App. 12a) (Italics in original).

The Appeals Court then went on, at length, also citing only *Fisher*, with one exception for Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995) ("An employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false *and* that discrimination was the real reason.") upon which *Fisher* is partly based. The *Fisher* law requiring additional, independent evidence of discrimination was ruled erroneous by this Court, and when it is imposed "no broader holding is necessary to support reversal" (*Reeves*, 530 U.S. 154).

Thus, both lower courts affirmed that the *Fisher* caselaw was imposed in *Hollander*.

Cyanamid argues that "the Second Circuit has squarely foreclosed Petitioner's argument that *Reeves* overturned controlling Second Circuit precedent... Indeed, the Second Circuit, consistent with this Court's mandates, applies the *Reeves* case-by-case approach." (Oppos. Brf. p.11, n.7). The Second Circuit *maintains* that it is following the *Reeves* decision, and it *maintains* that *Reeves* is in line with *Fisher* (except where it inconsistently admits past precedent may require revisiting, as seen in Schnabel (Petition. Brf. p.12), but other circuits do not read *Reeves* as "unfavorably" as does the Second Circuit, and whether the Second Circuit is in error on this matter is a basic issue of this petition.

The Second Circuit's view that *Reeves* did not change the *Fisher* standard is responsible for what Cyanamid terms Hollander's "unbroken string of adverse rulings." (Oppos. Brf. p.5) Indeed, the District Court and the Second Circuit were *obligated* to follow existing post-*Reeves* precedent

(Petition Brf. p. 11) within the circuit that held there was no change in the *Fisher* standard due to *Reeves*. Without a change in the law Hollander's appeal was ruled frivolous, but a change did exist. These precedents precluded the District and Appeals Courts from even properly considering applying Rule 60(b). But other Circuits are not reading *Reeves* as the Second Circuit does, and the Second Circuit now stands alone.

3. Precedential Evolution vs Correcting Erroneous Evidentiary Standard

Cyanamid argues that Hollander attempts to invoke Rule 60b "solely on precedential evolution". (Oppos. Brf. p.6, 10). However, the impact of *Reeves* upon *Fisher* was not merely a superseding ruling that modified, refined, expanded, or otherwise "evolved" *Fisher*. Rather, *Reeves* corrected an error in a fundamental rule of evidence by *Fisher*. The error violated a principle of evidence law that is so fundamental that it is widely understood even outside the legal realm: i.e., lying (or dishonest behavior) is very likely an attempt to conceal prohibited actions.

Judge Winter (former Chairman of the Supreme Court's Advisory Committee on Evidence Rules) forewarned of the seriousness of this error in his dissenting opinion in *Fisher* (id. at 1390):

> "My colleagues in the majority ... hold ... a prima facie case will, if the defendant remains mute as to the reason for the adverse employment decision, results in liability, but, the very same plaintiff's case can, if the defendant responds with a lie, be dismissed on insufficient grounds. I take it that the majority would now disapprove the standard charge found in model jury instructions, that the jury may (not must) infer a discriminatory motive from the consciousness of guilt reflected from dishonest statements about an adverse employment decision. ...

> This puzzling ruling is also at odds with a vast body of law allowing inference of consciousness of guilt to be drawn from dishonest behavior concerning facts material to litigation. ... My colleagues hold that this principle does not apply to employers or, perhaps, it no longer applies to any party to litigation, including criminal defendants."

The Supreme Court in *Reeves* confirmed that the *Fisher* law was wrong. It was wrong when it was established and it was wrong when it was imposed in *Hollander*. This is not a case of "precedential evolution", but rather a "correction" and as such a serious correction constitutes "special circumstances". It is a particularly egregious error because an employee who understands the correct rule and proceeds on that basis, is grossly unfairly treated when the courts continue to erroneously rule against him.

Hollander refers to *Tarkington* (Petition. Brf. p.10) where an analogous mistake of the court was considered applicable under Rule 60(b), and it is revealing that Cyanamid was silent on this.

This Court emphasized the significance of dishonest behavior as the basis for adjudicating discrimination cases (See, *Reeves*, 530 U.S. at 147, citing *Wright v. West; Wilson v. United States; Furnco Constr. v. Waters; St. Mary's v. Hicks;* etc. (citations at id. 147) in that lying is affirmative evidence of guilt for a jury to make the determination of intentional discrimination.

4. <u>Case-by-Case Approach Alone Is Not Following Reeves</u>

Cyanamid claims that the Second Circuit is following *Reeves* because it "applies the *Reeves* case-by-case approach." It is overly simplistic to read *Reeves* and conclude that the only requirement is a "case-by-case analysis". The lesson of *Reeves* is that evidence of

dishonesty (pretext) will *generally* be adequate to survive a directed verdict, and that to require additional, independent evidence of discrimination is a "misconceived evidentiary burden". The *Reeves* Court acknowledged that in "presumably rare" cases, it is conceivable that other factors could preclude a showing of discrimination, but that this would require unusual evidence as outlined in *Reeves* at 148. This Court in *Reeves* understood that *Fisher* always required more and this requirement [pretext-plus] is wrong. It is not the "case-by-case" analysis itself that is significant, but rather what that analysis actually is.

Since the Second Circuit established the *Fisher* caselaw in adjudicating its discrimination cases, it has shown that "lying about a material fact" is not relevant in their opinions as they state "Individual decision-makers may intentionally dissemble ... to hide a reason that is nondiscriminatory ..." *Fisher* at 1337-38. The Second Circuit cannot assume that lying is always for a nondiscriminatory reason without what this Court stated requires "abundant and uncontroverted evidence that no discrimination existed." *Reeves* at 148. To rule otherwise would permit courts to always speculate that no discrimination exists, particularly when a jury finds sufficient evidence of pretext and mendacity that discrimination did occur.

One has to search long and hard to find any reference or use of the "dishonesty principle of law" within the Second Circuit's post-*Fisher* and post-*Reeves* decisions. The *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc) opinion was a contentious 6-5 decision reflecting that dishonest behavior was rejected by the majority as an issue. The minority strenuously argued about this issue and submitted three separate dissenting opinions with the five judges joining (id. 1354 - 1391).

5. Schnabel Ruling

Cyanamid takes issue with statements by the *Schnabel* panel (Petition. Brf. p. 12), which Hollander's refers to as further evidence that the *Reeves* decision did have an effect on *Fisher*. It makes no sense for that panel to refer to *Woroski* and *Hollander*, even when prefaced by "to the extent that...", if the "extent" is null. Further, if the panel "must decide whether those cases (including *Fisher*) are still good law [1] [after *Reeves*]", then clearly there is *something* about them regarding the "per se rule" that caused the *Schnabel* panel to express concern. A plain reading of the cases shows that more than prima facie and pretext was indeed required.

6. Dilatory Tactics

Cyanamid accuses Hollander of having "dragged the present litigation on for nearly sixteen years... harassing Respondent..." (Oppos. Brf. p.12). While this false accusation is peripheral to the legal argument raised, it is relevant to refute the charge because it is a component of Cyanamid's unceasing efforts to denigrate Hollander's legal claims.[2] There is no conceivable benefit to Hollander from delaying the case. He agreed twice to settle for the amounts recommended by two special masters conferences (Petition. Brf. p.3). Additional expense due to delay is exceedingly far more difficult for Hollander to absorb than it is for

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[1] To-date their has been no ruling within the Second Circuit to respond to this question whether "*Hollander* is good law" as the Second Circuit in *Hollander* refused to address this question. Hopefully this Court will, in granting certiorari.

[2] Cyanamid opens its response brief with a false, derogatory claim: that Hollander "fails fully to disclose" the history of the case. Hollander included the same relevant history as Cyanamid, but without Cyanamid's cynical tone. (Petition. Brf. p. 2-6).

Cyanamid, which caused tremendous delays. Rather than cite a litany of successful legal maneuvers Cyanamid was able to achieve, Hollander will, for brevity's sake, cite only the example that substantial discovery (400 additional names) originally sought in 1985 was delayed and not produced until 1997 -- twelve (12) years later.

7. New Petition Raises New Issues

When the first petition to this Court was filed, Cyanamid was not concerned enough to file a response. Now, when the issue revolves around the Second Circuit not complying with *Reeves*, they feel an Opposition Brief is warranted. This belies Cyanamid's claim that the present petition is simply the same issue raised "again and again." For if it were, and particularly if this petition were truly "frivolous", then it would be unnecessary to remind this Court to deny certiorari. It is more plausible that the question of the Second Circuit's attitude toward *Reeves* versus *Fisher* is, in fact, seen by *both* parties as a genuine issue warranting this Court's attention. It is not the same issue as Hollander's first Petition and the superficial treatment of the principles of *Reeves* by the Second Circuit is an issue serious enough for this Court to review.

The issues raised by Hollander's petition are quite different from those of his first petition to this Court. In that petition, the court was presented with the same issues raised and resolved ultimately in *Reeves*. In the present petition, the issues focus on the Second Circuit's resistance to adopting the *Reeves* standard, upon the proper application of Rule 60(b)(5), and the interest of justice doctrines of this Court.

CONCLUSION

This Court should grant the Writ of Certiorari or a Summary Disposition Based on the Merits to the Second Circuit Court of Appeals to hear and decide the important issues posed.

Respectfully submitted,

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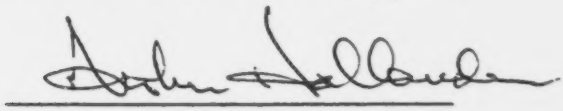

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